90-375

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES LESLIE BROWN,
Petitioner

versus

CURTIS D. EARP, JR.,
COMMISSIONER, GEORGIA DEPARTMENT OF
PUBLIC SAFETY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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August 22, 1990

QUESTION PRESENTED FOR REVIEW

DOES SECTION 40-13-33 OF THE OFFICIAL CODE OF GEORGIA ANNOTATED WHICH PROVIDES THAT "ANY CHALLENGE TO A MISDEMEANOR CONVICTION OF ANY OF THE TRAFFIC LAWS ... WHICH MAY BE BROUGHT [HABEAS CORPUS] MUST BE FILED WITHIN 180 DAYS OF THE DATE THE CONVICTION BECOMES FINAL" CONSTITUTE AN IMPERMISSIBLE SUSPENSION OF THE WRIT OF HABEAS CORPUS IN VIOLATION OF ARTICLE I, SECTION 9, PARAGRAPH 2 OF THE CONSTITUTION OF THE UNITED STATES.?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to this proceeding.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

JAMES LESLIE BROWN,

Petitioner

vs.

CURTIS D. EARP, JR., COMMISSIONER,
GEORGIA DEPARTMENT OF PUBLIC SAFETY,

Respondent

APPLICATION FOR WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

JAMES LESLIE BROWN prays that the Writ of Certiorari issue to the Georgia Supreme Court to review the decision of that court dated and entered May 31, 1990, (Case No. S90A0477) denying petitioner's Motion for Reconsideration of the Georgia Supreme Court's previous decision on May 17, 1990, wherein the

court reversed the decision of the Fulton County Superior Court (Case No. D-63814) dated June 13, 1989 and entered on June 29, 1989, wherein the superior court granted petitioner's application for the Writ of Habeas Corpus.

Petitioner's Motion for Stay of the Remittitur was granted by the Georgia Supreme Court on June 1, 1990.

OPINIONS BELOW

Reproduced in the appendix to this petition are: (1) the Order of the Superior Court of Fulton County entered June 29, 1989, granting Habeas Corpus relief to petitioner, (2) May 17, 1990, decision of the Georgia Supreme Court reversing the superior court, (3) May 31, 1990, decision of the Georgia Supreme Court denying petitioner's Motion for Reconsideration, (4) June 1, 1990, order of the Georgia Supreme Court granting

petitioner's Motion for Stay of the Remittitur, and (5) April 20, 1990 decision of the Georgia Supreme Court in EARP v. BOYLAN, 260 Ga. 112, ___ S.E.2d __ (1990).

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3) which authorizes the grant of the Writ of Certiorari to the highest court of a State in a case where a right, privilege or immunity is specifically claimed under the Constitution of the United States. The Georgia Supreme Court denied petitioner's timely Motion for Reconsideration on May 31, 1990.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 9, Paragraph 2:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses

in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On or about February 3, 1988, JAMES LESLIE BROWN was served with a notice from the Georgia Department of Public Safety declaring him to be a Habitual Violator of the state's traffic laws and revoking his license to drive for a period of 5 years. The Commissioner's actions were purportedly based upon the authority of O.C.G.A. §40-5-58 which authorizes the Department of Public Safety to declare a person a "habitual violator" who has been "arrested and convicted" three or more times within a 5 year period of certain offenses designated therein including Driving While Under the Influence of Alcohol (D.U.I.). The stated basis for the declaration was Mr. Brown's convictions

for D.U.I. in the Recorder's Court of the City of Woodbury on November 1, 1983, the Spalding County State Court on October 28, 1983, and the Recorder's Court of the City of Hampton on February 23, 1987.

In a timely fashion petitioner pursued an unsuccessful administrative review of the decision which included an appeal to the Superior Court of Spalding County. An application for discretionary appeal of the superior court decision was made to the Georgia Court of Appeals which declined to review the case.

On January 20, 1989, petitioner filed a Petition for Habeas Corpus in the Superior Court of Fulton County. An evidentiary hearing was had on the 13th of June, 1989. Following the hearing the court entered an order which found as follows:

The court finds based on the testimony of the petitioner that the revocation significantly restrains the petitioner's liberty and this action is therefore properly before the court. HARDISON v. MARTIN, 254 Ga. 719[,334 S.E.2d 161] (1985).

The petitioner testified that at the time of each of the convictions in question he was unrepresented by counsel. He stated he was at no time advised of his rights to an attorney, to remain silent, to a trial by jury or to confront the witnesses against him. He contends he did not waive any of these rights. He further stated he was not advised of the minimum and maximum sentences he could receive.

In BOYKIN v. ALABAMA, 395 U.S. 238 (1969), the U. S. Supreme Court held, "after a prisoner raises the question of the validity of his plea of guilty, the burden is on the state to show that the plea was intelligently and voluntarily entered." CONLOGUE v. THE STATE, 243 Ga. 141, 141 [,253 S.E.2d 168] (1979), quoting from ROBERTS v. [GREENWAY], [233] Ga. 473[,211 S.E.2d 764] (197[5]). The record must affirmatively reflect that the guilty plea was made voluntarily with understanding of the nature of the charge and

consequences of the plea. PURVIS v. CONNELL, 227 Ga. 764, 767[,182 S.E.2d 892] (1971). Similarly, the record must show that the defendant was offered counsel and intelligently and understandingly rejected the offer. Anything else is not a waiver. PURVIS, supra, at 766. A knowing and intelligent waiver is an act which can never be lightly presumed and, indeed, the presumption is against waiver. CAMPBELL v. STATE, 128 Ga. App. 76[, 195 S.E.2d 664] (1973). The requirement that pleas and waivers be knowing and intelligent applies to misdemeanors as well as felony convictions. BALDASAR v. ILLINOIS, 446 U.S. 222 (1980).

Here, the records of conviction do not affirmatively reflect that the guilty pleas at issue were intelligently and voluntarily entered or that the jpetitioner knowingly waived his rights to an attorney. Nor has the respondent adduced evidence which shows anything to the contrary occurred. Accordingly, these convictions should not have been considered by the respondent in revoking petitioner's driver's license.

Respondent appealed this decision to the Georgia Supreme Court which reversed

the Superior Court. Its decision was based on the provisions of O.C.G.A. §40-13-33 which provides in pertinent part as follows:

> Any challenge to a misdemeanor conviction of any of the traffic laws of this state or the traffic laws of any county or municipal government which may be brought pursuant to Chapter 14 of Title 19 [Habeas Corpus] must be filed within 180 days of the date the conviction becomes final.
>
> Failure to file the challenge within the time prescribed in this Code section shall divest the court of jurisdiction.

In so ruling the court followed the reasoning of EARP v. BOYLAN, 260 Ga. 112, ___ S.E.2d ___ (1990), which also involved a driver's license deprivation. There, the court noted:

> The habeas court found that O.C.G.A. § 40-13-33 (a) and (b) suspend the writ of habeas corpus in violation of U.S.

Const. Art. I, Sec. IX, Cl. II and Ga. Const. Art I, Sec. I, Par. XV.

In HARDISON v. MARTIN, 254 Ga. 719, 721 (334 SE2d 161) (1985), we held that

one not in physical custody may petition for habeas corpus to challenge the revocation of his driver's license on the ground that the underlying sentence upon which the revocation is based is void for a reason not appearing on the face of the record.

In response to HARDISON the legislature enacted O.C.G.A. §40-13-33. Subsection (a) of this statute provides that any habeas corpus challenge which may be filed to a misdemeanor traffic offense must be filed within 180 days of conviction. Under subsection (b), where, as in this case, the conviction challenged became final prior to March 28, 1986, the habeas petition must have been filed within 180 days of March 28, 1986.

There are numerous instances in which this court has construed the Georgia Habeas Corpus Act, OCGA § 9-14-1 et seq. to provide greater protections than the Federal Constitution requires. See, e.g., MCDUFFIE v. JONES, 248 Ga. 544, 545 fn. 1 (283 SE2d 601) (1981); ZANT

v. COOK, 259 Ga. 299 (__SE2d__) (1989). It is likewise clear that the holding of HARDISON goes beyond federal constitutional and statutory habeas corpus requirements. The federal courts have uniformly held that the federal habeas corpus statute, 28 U.S.C. §2254, does not give them jurisdiction to entertain a habeas corpus petition whereas petitioner who is not in custody alleges that his liberty has been restrained because his driver's license has been revoked or suspended. WESTBERRY v. KEITH, 434 F2d 623 (CA 5 1970) ["We can find no decision by the [United States] Supreme Court which would allow federal courts to take habeas corpus jurisdiction under §2254 when the petitioner has applied for the writ after suffering a fina and the revocation of the right to drive on the state's highways." 434 F.2d at 624-5.]; HARTS v. STATE of INDIANA,, 732 F2d 95 (CA 7 1984) ; WHORLEY v. BRILHART, 359 F. Supp. 539 (E.D. Va. 1973).

Because HARDISON v. MARTIN provides greater habeas corpus protection that is required by the United States Constitution, we hold that the legislature may place a procedural limitation on that protection without suspending the writ within the meaning of U.S. Const. Art. I, Sec. IX, Cl. II.

BOYLAN, supra, 260 Ga. at 112, 113.

REASONS FOR GRANTING THE WRIT

That the Georgia Supreme Court could reach the result it did in this case is simply astounding in view of its stated adherence to United States Supreme Court precedent as the basis for its decision in HARDISON v. MARTIN, supra.:

> While "the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail[,]" JONES v. CUNNINGHAM, 371 U.S. 236, 238 (83 S.C. 373, 9 L.E.2d 285)(1963), the remedy has in modern times been made available where there are significant restraints on the petitioner's liberty other than physical custody. Id.; CARAFAS v. LAVALLEE, 391 U.S. 234 (88 S.C. 1556, 20 LE2d 554) (1968); PARRIS v. STATE, 232 Ga. 687 (208 SE2d 493) (1974). The writ of habeas corpus may be used "to relieve the stigma and burden of an invalid sentence," ATKINS v. HOPPER, 234 Ga. 330, 333 (216 S.E.2d 89)(1975), or

where the petitioner has "'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him'" CARAFAS v. LAVELLEE, supra at 237.

See JONES v. CUNNINGHAM, 371 U.S. 236, supra, where the Supreme Court noted that the petitioner's liberty was restrained by a condition of his parole requiring him to obtain permission from his parole officer in order to own or operate a motor vehicle. 371 U.S. at 237 and 242.

HARDISON v. MARTIN, supra at 720-21.

In JONES v. CUNNINGHAM, 371 U.S. 236 (1963), petitioner sought federal habeas relief from a state sentence. While not in actual physical custody he was subject to several conditions of parole including a requirement that he not own or operate a motor vehicle without his parole officer's permission. In rejecting the respondent's argument the petitioner

lacked standing to bring the action this court noted:

> What matters is that they [the conditions of parole] significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate phyical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute.
>
> JONES v. CUNNINGHAM, supra, 83 S.Ct. at 377.

While the Georgia Supreme Court has apparently taken the view a license to operate a motor vehicle is a privilege, not a right of constitutional demension or import, this court has taken a more realistic view:

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. [Cits] This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege".
>
> BELL v. BURSON, DIR., GA. DEPT. OF PUBLIC SAFETY, 402 U.S. 535, 539 (1971).

Only last term this court reaffirmed its adherence to the standards laid down in JONES v. CUNNINGHAM, supra. In MALENG v. COOK, 490 U.S. ___, 104 L.Ed.2d 540, 109 S.Ct. ___ (1989), petitioner sought to challenge an expired state sentence which would increase by several years the term petitioner would be required to serve on a subsequent state sentence. At the time of his petition he was serving a federal sentence. Only after he completed his federal sentence and began service of his state sentence would the enhancement be suffered. As the court noted:

> The question presented by this case is whether a habeas petitioner remains "in custody" under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted.

> We hold that he does not. While we have very liberally construed the "in custody" requirement for purposes of federal habeas, we have never extended it to the situation where a habeas petitioner suffers no present restraint for a conviction.
>
> MALENG v. COOK, supra, 104 L.Ed.2d at 545-6.

In the matter sub judice, unlike MELENG, supra, the uncontroverted evidence established the petitioner suffered a present restraint on his liberty . The trial court specifically found "the revocation significantly restrains the petitioner's liberty". That finding has never been contested in this case. Accordingly, it must be said the limiting provisions of O.C.G.A. §40-13-33 affect federally guaranteed habeas corpus rights of the petitioner.

Inasmuch as federal habeas constitutional guarantees are involved the petition may not be dismissed for

failure to comply with technical procedural requirements and unreasonable limitations such as the one here are prohibited. As the Georgia Supreme Court itself has noted:

> Any limitation upon the right to the writ of habeas corpus must be reviewed in light of the Unites States constitutional protection of the privilege to the writ. Art. I., Sec. IX. The Georgia legislature enacted the state habeas corpus to expand the scope of state habeas thereby bringing it into accord with the federal constitutional privilege to federal habeas corpus. O.C.G.A. §9-14-40. Under the expanded view in this chapter, the assumption is that a prisoner should have wide latitude in filing a petition for habeas corpus. For example, a petition may not be dismissed for failure to comply with technical procedural requirements.
>
> GILES v. FORD, 258 Ga. 245, 245, 368 S.E.2d 318, 318 (1988).

And in its notable recent decision in ZANT v. COOK, 259 Ga. 299, __ S.E.2d __ (1989), the Georgia Supreme Court rejected the state's argument that a habeas challenge to a conviction more than 35 years old was not barred by petitioner's delay in filing the habeas action. There, the court stated:

> The state first argues that the doctrine of laches should apply to bar Cook's collateral attack on his 1950 conviction. The state takes the position that Cook's delay in bringing this petition for habeas is unreasonable, and that it has been prejudiced by Cook's delay.
>
> Under the authority of JACKSON v. JONES, 254 Ga. 127, 129 (327 S.E.2d 206)(1985), this court has not applied the doctrine of laches to habeas corpus cases. Even if the doctrine were applicable it would not serve to bar Cook's claim in this case. Cook's civil rights were fully restored in 1965. It would be unreasonable to expect a person to attempt to set aside a conviction which was not detrimentally affecting

> him. [Under MELENG[v. COOK, 490 U.S. __, 104 L.Ed.2d 540, 109 S.Ct. __ (1989)], Cook would not have been permitted to challenge hsi 1950 conviction in a federal habeas proceeding after his release from physical confinement in 1957 because he was not "in custody" within the meaning of the federal habeas statute.] Further, the habeas court found that Cook did not become aware of his legal rights regarding his 1950 conviction until his trial in 1985 and therefore did not unreasonable delay in asserting these rights. The habeas court concluded that the state's argument that the 1950 conviction is too old to be attacked, but not too old to be used to enhance Cook's sentence for his 1985 conviction of murder is without merit. We agree.
>
> ZANT, supra, 259 Ga. at 300.

This court, in addressing the issue of the time for filing habeas petitions, has consistently emphasized the mere delay in filing should not be a basis for dismissing such petitions. In HEFLIN v. UNITED STATES, 358 U.S. 415, 420 (1959), the court noted that in habeas corpus

"there is no statute of limitations, no res judicata, and ... the doctrine of latches is inapplicable." In overturning a state court's summary dismissal of a petition for habeas relief because of an eight year delay, and citing several examples of cases in which the court permitted the filing of habeas petitions after long delays, the court in HERMANN v. CLAUDY, 350 U.S. 116, 123 (1956), noted "[t]he sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy," regardless of the time lapse.

More recently, in VASQUEZ v. HILLERY, 474 U.S. 254 (1986), the court stated that "sound jurisprudence" counseled against any approach which would condition the grant of relief upon the passage of time between a conviction and the filing of a petition for federal

habeas corpus. The court in VASQUEZ was discussing the application of 28 U.S.C. §2254, Rule 9(a), which permits a state to move for dismissal of a habeas petition when it has been prejudiced in its ability to respond to the petition by the delay in its filing.

In applying Rule 9(a), the courts have uniformly held that mere delay is not a sufficient ground for dismissal of a habeas petition on this basis; rather, the state seeking dismissal must show a particular prejudice to its ability to respond to the allegations in the petition. HORACE v. WAINWRIGHT, 781 F.2d 1558, 1565 (11th Cir. 1986); MCDONNEL v. ESTELLE, 666 F.2d 246 (5th Cir. 1982); HENSON v. ESTELLE, 641 F.2d 250 (5th Cir. 1981). As was stated by the court in DAVIS v. ADULT PAROLE AUTHORITY, 610 F.2d 410, 414 (6th Cir. 1979):

[A] rule which would permit a court to dismiss an action for habeas relief without any consideration of the equities presented renders the habeas corpus process inadequate to test the legality of a person's conviction and, thereby, constitutes a prohibited suspension of the writ.

CONCLUSION

This application for certiorari merits acceptance because of Georgia's undeniable disregard of the constitutional limitations on the power of the state to limit the availability of the Writ of Habeas Corpus. The provisions of O.C.G.A. §40-13-33 as construed by the Georgia Supreme Court in this case amount to a denial of due process and a suspension of the writ.

It creates a "Catch 22" which a petitioner can never overcome. It affords a scant 180 days to file the petition after conviction. Yet, a petitioner whose liberty is restrained because of a license deprivation must first exhaust available administrative remedies including an appeal to the superior court. EARP v. LYNCH, 257 Ga. 633, 362 S.E.2d 55 (1987). Constitutional deprivations such as the

one proved by the petitioner in this case are not reviewable in such proceedings because there the licensee may not collaterally attack a conviction causing the suspension unless the conviction is "void on its face". EARP v. FLETCHER, 183 Ga. App. 593, 594, 359 S.E.2d 456 (1987). Seldom, if ever, will the administrative review be concluded within 180 days. Furthermore, in most license suspension cases, as here, the department's action revoking the license will not have occurred until well after 180 days from the date of conviction has expired. In these circumstances no restraint of the petitioner's liberty (or standing to bring a habeas petition) arises until after the time limit has run.

The statute thus eliminates the writ entirely and deprives petitioners of any remedy without requiring any showing by

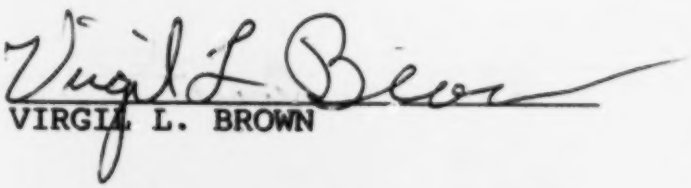
the state that it has somehow been prejudiced by the delay in filing. No such assetion was made by the respondent in this action. Nor has he contended the petitioner's rights were not violated in the obtaining of the convictions supporting respondent's decision to take petitioner's license.

It can not be said this is not a suspension of the writ within the meaning of the federal prohibitions because, as found by the habeas court, the respondent's actions resulted in a substantial restraint on the liberty of the petitioner. This finding has never been contested by the respondent. This circumstance renders petitioner "in custody" within the meaning of the federal statutory provisions and entitles him to the protections of the federal habeas corpus constitutional guarantees. The states are simply not

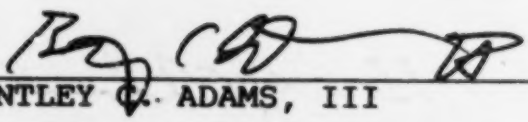
free to deny their citizens these basic rights.

A failure by this court to correct the decision below will literally open the floodgates to wholesale deprivations of defendants' constitutional rights in traffic prosecutions. If, for no other reason, because it impacts adversely on the lives of thousands, if not millions, of members of the Georgia motoring public, it is a question worthy of this court's consideration.

RESPECTFULLY SUBMITTED,



VIRGIL L. BROWN



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CERTIFICATE OF SERVICE

This is to certify that I have this date served four (4) copies of the within and foregoing Motion to Proceed in Forma Pauperis upon MICHAEL J. BOWERS, Georgia Attorney General, Georgia Department of Law, Room 132, Judicial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334 by depositing the same in the United States Mail in a properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This 28 day of August, 1990.

BENTLEY C. ADAMS, III

APPENDIX

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES LESLIE BROWN,	*	
	*	
Petitioner,	*	CIVIL ACTION NO.
	*	D-63814
vs.	*	
	*	Filed in Office
CURTIS D. EARP, JR.,	*	Jun 29, 1989
Commissioner,	*	
Georgia Department	*	/s/ J.W.
of Public Safety	*	Deputy Clerk
	*	Fulton Superior
Respondent	*	Court

ORDER ON PETITION FOR HABEAS CORPUS

The above and foregoing Petition for Writ of Habeas Corpus regularly came on for hearing before this Court on the 13th day of June, 1989, whereupon evidence and argument was received thereon.

Petitioner seeks to attack the underlying D.U.I. convictions which resulted in his classification as a habitual violator of the traffic laws of this state and the revocation of his driver's license.

The Court finds based on the testimony of the petitioner that the revocation significantly restrains the petitioner's liberty and this action is therefore properly before the court. HARDISON v. MARTIN, 254 Ga. 719 (1985).

The petitioner testified that at the time of each of the convictions in question he was unrepresented by counsel. He stated he was at no time advised of his rights to an attorney, to remain silent, to a trial by jury or to confront the witnesses against him. He contends he did not waive any of these rights. He further stated he was not advised of the minimum and maximum sentences he could receive.

In BOYKIN v. ALABAMA, 395 U.S. 238 (1969), the U. S. Supreme Court held, "after a prisoner raises the question of the validity of his plea of guilty, the

burden is on the state to show that the plea was intelligently and voluntarily entered." CONLOGUE v. THE STATE, 243 Ga. 141, 141 (1979), quoting from ROBERTS v. THE STATE, 243 Ga. 473 (1975). The record must affirmatively reflect that the guilty plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea. PURVIS v. CONNELL, 227 Ga. 764, 767 (1971). Similarly, the record must show that the defendant was offered counsel and intelligently and understandingly rejected the offer. Anything else is not a waiver. PURVIS, supra, at 766. A knowing and intelligent waiver is an act which can never be lightly presumed and, indeed, the presumption is against waiver. CAMPBELL v. STATE, 128 Ga. App. 76 (1973). The requirement that pleas and waivers be knowing and intelligent applies to

misdemeanors as well as felony convictions. BALDASAR v. ILLNOIS, 446 U.S. 222 (1980).

Here, the records of conviction do not affirmatively reflect that the guilty pleas at issue were intelligently and voluntarily entered or that the petitioner knowingly waived his right to an attorney. Nor has the respondent adduced evidence which shows anything to the contrary occurred. Accordingly, these convictions should not have been considered by the respondent in revoking the petitioner's driver's license.

Because of the foregoing it is unnecessary to reach the remaining issues raised in the petition.

THEREFORE, the prayers contained in the petition are hereby GRANTED. The respondent is directed to revise its records accordingly to remove the

petitioner from habitual violator status and reinstate his driver's license forthwith.

SO ORDERED this 13th day of June, 1989 nunc pro tunc.

/s/ Joel J. Fryer
JOEL J. FRYER, JUDGE, SUPERIOR COURTS, ATLANTA JUDICIAL CIRCUIT

CERTIFICATE OF COUNSEL

This is to certify that the foregoing is in accordance with the oral pronouncement of the court made in open court.

Respondent's attorney approves the same as to form.

This 13th day of June, 1989.

/s/ Bentley C. Adams, III
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In the Supreme Court of Georgia

Decided: May 17, 1990

S90A0477. EARP, COMMISSIONER
V. BROWN

FLETCHER, Justice.

This appeal arises from the Superior Court of Fulton County's issuance of a writ of habeas corpus to James Leslie Brown. Curtis D. Earp, Jr., as commissioner of the Department of Public Safety, had revoked Brown's driver's license pursuant to OCGA § 40-5-58 due to his DUI convictions on October 28, 1983, November 1, 1983, and February 23, 1987. Brown did not appeal any of the three convictions nor did he seek habeas relief prior to this action. Brown did unsuccessfully appeal the commissioner's revocation of his license. He then filed this habeas action and alleged, inter alia, that the three underlying convictions were not valid in that the

records of the convictions do not show his waiver of his rights to an attorney, to a jury trial, or to plead not guilty and that neither a judge or a magistrate had signed two of the convictions. The trial court granted habeas relief on the grounds that

> the records of conviction do not affirmatively reflect that the guilty pleas at issue were intelligently and voluntarily entered or that the petitioner knowlingly waived his right to an attorney.

We reverse and remand.

1. Earp argues that the trial court erred in not dismissing this habeas action pursuant to OCGA § 40-13-33 because the challenged convictions were entered more that 180 days after March 28, 1986, or the date of the conviction. Brown argues, inter alia, that if OCGA § 40-13-33 did apply to this action, it is

unconstitutional as a suspension of the Writ of Habeas Corpus. This Court's decision in EARP v. BOYLAN, S90A0195 (Ga April 20, 1990) controls this issue adversely to Brown.

2. (a). Brown argues that OCGA § 40-13-33 does not apply to his habeas action because the records Earp introduced in this action clearly show that the underlying judgments are defective on their faces (e.g., the record does not show waiver of a jury trail) and are, therefore, not final. This argument is without merit.

Brown's argument is contrary to the language of OCGA § 40-13-33 (a) which states that:

> [a]ny challenge to a misdemeanor conviction of any of the traffic laws of this state or the traffic laws of any county or municipal government which may be

> brought pursuant to Chapter 14 of Title 9 must be filed within 180 days of the date the conviction becomes final.

This statute creates a limited and procedural exception to the general rule of law codified at OCGA § 17-9-4 that a defendant can collaterally attack void judgments at any time. It limits such attacks to within the first 180 days after the conviction has been finally adjudicated, even if a habeas petition could be brought and would be successful. It is clear from Brown's petition that despite his arguments to the contrary, he is attempting to attack the underlying convictions. OCGA § 40-13-33 (a) as it presently reads does not permit this.

(b) The habeas court did not address whether the three convictions were finally adjudicated although Brown has raised this issue by alleging that

neither a judge or a magistrate had signed two of them. Therefore, we reverse the grant of the writ and remand for further proceedings.

Judgement reversed and remanded. Clarke, C.J., Smith P. J. Weltner, Bell, Hunt and Fletcher, JJ., and Judge Isaac Jenrette concur; Benham, J., not participating.

SUPREME COURT OF GEORGIA

Atlanta, May 31, 1990

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. S90A0477

CURTIS D. EARP, JR., COMR. V. JAMES LESLIE BROWN

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Clarke, C.J., Smith P.J., Weltner, Bell, Hunt and Fletcher, JJ., and Judge Isaac Jenrette concur; Benham, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal

of said court affixed the day and year last above written.

Joline B. Williams, Clerk

S90A0477

SUPREME COURT OF GEORGIA

ATLANTA, June 1, 1990

The Honorable Supreme Court met pursuant to adjournment.

BY: FLETCHER, J.

The following direction was given:

CURTIS D. EARP, JR., COMR. V. JAMES LESLIE BROWN

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on May 31, 1990, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for

ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ Norman S. Fletcher
Justice Norman S. Fletcher

IN THE SUPREME COURT OF GEORGIA

Decided: April 20. 1990

S90A0195. EARP, COMMR. V. BOYLAN.

CLARKE, Chief Justice.

Appellee Boylan was convicted of three separate offenses of driving with a suspended license between February 1, 1984, and October 18, 1985. The Department of Public Safety (Department) thereafter declared him an habitual violator pursuant to OCGA § 40-5-58, and revoked his driver's license on December 6, 1985. The record shows that the Department issued appellee a probationary license so that he may drive to and from work.

On December 9, 1988, appellee filed a petition for habeas corpus seeking relief from the revocation of his driver's license. The habeas court found that appellee did not knowingly waive his

right to counsel at any of his three trials for driving with a suspended license. The habeas court determined that the three criminal dispositions which had resulted in appellee's habitual violator status had substantially restrained appellee's liberty and therefore he was entitled to habeas relief. The habeas court ordered the Department to rescind appellee's status as an habitual violator, and to return his driver's license.

At the same time the habeas court entered a separate order denying the Department's motion to dismiss appellee's habeas petition for failure to timely file it in accordance with OCGA § 40-13-33 (b). The habeas court determined that OCGA § 40-13-33 (a) and (b) unconstitutionally suspends the writ of habeas corpus.

1. The habeas court found that OCGA § 40-13-33 (a) and (b) suspend the writ of habeas corpus in violation of U.S. Const. Art. I, Sec. IX, Cl. II and Ga. Const. Art I, Sec. I, Par. XV.

(a) In HARDISON v. MARTIN, 254 Ga. 719, 721 (334 SE2d 161) (1985), we held that

> one not in physical custody may petition for habeas corpus to challenge the revocation of his driver's license on the ground that the underlying sentence upon which the revocation is based is void for a reason not appearing on the face of the record.

In response to HARDISON the legislature enacted OCGA § 40-13-33. Subsection (a) of this statute provides that any habeas corpus challenge which may be filed to a misdemeanor traffic offense must be filed within 180 days of conviction. Under subsection (B), where, as in this case,

the conviction challenged became final prior to March 28, 1986, the habeas petition must have been filed within 180 days March 28, 1986.

There are numerous instances in which this court has construed the Georgia Habeas Corpus Act, OCGA § 9-14-1 it seq. to provide greater protections than the Federal Constitution requires. See, e.g., MCDUFFIE v. JONES, 248 Ga. 544, 545 fn. 1 (283 SE2d 601) (1981): ZANT v. COOK, 259 Ga. 299 (__ SE2d __) (1989) It is likewise clear that the holding of HARDISON goes beyond federal constitutional and statutory habeas corpus requirements. The federal courts have uniformly held that the federal habeas corpus statute, 28 U.S.C. § 2254, does not give them jurisdiction to entertain a habeas corpus petition where petitioner who is not in custody alleges

that his liberty has been restrained because his driver's license has been revoked or suspended. WESTBERRY v. KEITH, 434 F2d 623 (CA 5 1970)1; HARTS v. STATE OF INDIANA, 732 F2d 95 (CA 7 1984); WHORLEY v. BRILHART, 359 F. Supp. 539 (E.D. Va. 1973)

Because HARDISON v. MARTIN provides greater habeas corpus protection than is required by the United State Constitution, we hold that the legislature may place a procedural limitation on that protection without suspending the writ within the meaning of U.S. Const. Art. I, Sec. IX, Cl. II.

b) As the Department points out in its brief, there are a number of recognized procedural limitations on the writ of habeas corpus which do not have the effect of suspending it in violation of the Georgia Constitution. See OCGA §

9-14-51 (limitation on successive habeas corpus petitions); REED v. HOPPER, 235 Ga. 298 (219 SE2d 409) (1975) (conditions which legislature placed on writ of habeas ccorpus in the 1975 Habeas Corpus Act do not on their face suspend writ); VALENZUELA v. NEWSOME, 253 Ga. 793 (325 SE2d 370) (1985) (failure to make a timely objection to an error or deficiency in the trial court constitutes a waiver for purposes of habeas corpus review, absent statutory exceptions of cause, prejudice of miscarriage of justice); BLACK v. HARDIN, 255 Ga. 239 (336 SE2d 754) (1985) (failure to enumerate as error on appeal any alleged error in trial court constitutes waiver of habeas review); PATTERSON v. EARP, 257 Ga. 729 (363 SE2d 248) (1988) (failure to file application to appeal bars review of habeas claim under HARDISON v. MARTIN).

We hold that the precedural limitations of OCGA § 40-13-33 (a) and (b) neither suspend the writ or, as appellee argues, cause a court to dismiss an action for habeas without consideration of the equities presented. Rather, the statute provides that in a narrowly defined class of cases--those in which a petitioner who is not in custody seeks habeas relief pursuant to HARDISON v. MARTIN from a misdemeanor traffic conviction--the petition for habeas corpus must be filed within 180 days of conviction. The statute does not prevent a habeas court from inquiring into the validity of the petitioner's misdemeanor traffic conviction; it merely prescribes the time in which such inquiry may be made. As such it imposes a permissible procedural restriction on a limited group of cases. It can not be said that the

statute suspends the writ within the meaning of Ga. Const. ARt. I, Sec. I, Par. XV.

c) Therefore we reverse the habeas court's holding that OCGA § 40-13-33 (a) and (b) are unconstitustional. We also reverse the habeas court's denial of the Department's motion to dismiss the petition for appellee's failure to timely file it in accordance with OCGA § 40-13-33 (b).

2. We reaffirm the holding of HARDISON v. MARTIN, supra and decline the Department's request to overrule it.

Judgment reversed and remanded. All the Justices concur.

---

1. "We can find no decision by the [United States] Supreme Court which would allow federal courts to take habeas corpus jurisdiction under § 2254 when the petitioner has applied for the writ after suffering a fine and the revocation of

the right to drive on the state's highways." 434 F2d at 624-5.

(2)

No. 90-375

Supreme Court, U.S.
FILED
SEP 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

JAMES LESLIE BROWN,

Petitioner,

v.

CURTIS D. EARP, JR., COMMISSIONER, GEORGIA DEPARTMENT OF PUBLIC SAFETY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

Whether a state statute imposing procedural limitations on the power of state trial courts to entertain petitions for the writ of habeas corpus by limiting the time within which such petitions may be filed is a suspension of the writ prohibited by Art. I, Sec. IX, Cl. II of the United States Constitution?

PARTIES TO THE PROCEEDING

The caption contains the correct and proper names of all parties to this proceeding.

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OPINIONS BELOW

The only opinions issued in this case were issued by the Superior Court of Fulton County, Georgia, and by the Supreme Court of Georgia. The opinion of the Supreme Court of Georgia is reported at 260 Ga. 215 (1990). The Order of the Superior Court of Fulton County is unreported. Both opinions are attached to Petitioner's Petition for Writ of Certiorari as appendices.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

In addition to the constitutional and statutory provisions set forth in Petitioner's Petition for a Writ of Certiorari, Respondent submits that the following provision is relevant to this case.

United States Constitution, Amendment Ten:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Petitioner was charged, by accusation, with committing the traffic offense of driving under the influence in

violation of O.C.G.A. § 40-6-391 on three separate occasions. Convictions were entered on these charges on October 28, 1983, in the State Court of Spalding County; on November 1, 1983, in the Recorder's Court of the City of Woodbury; and on February 23, 1987, in the Recorder's Court of the City of Hampton. Petitioner was declared to be a habitual violator by the Georgia Department of Public Safety pursuant to the provisions of Georgia's Habitual Violator Act, O.C.G.A. § 40-5-58, which provides for the mandatory revocation for a five-year period of the driver's license of a person arrested and convicted three or more times within a five-year period of certain designated offenses, including driving under the influence.

Petitioner requested and received an administrative review of the revocation of his driver's license, and subsequently appealed the hearing officer's decision upholding the revocation to the Superior Court of Spalding County, which denied his appeal and entered judgment against him. The Georgia Court of Appeals denied an application for discretionary appeal on July 7, 1988. Some seven months later, on January 20, 1989, Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Fulton County, challenging each of the three convictions for driving under the influence which led to his classification as a habitual violator and to the revocation of his driver's license. Petitioner contends that he entered guilty pleas to these charges which were not entered knowingly and voluntarily.

After a hearing, the Superior Court of Fulton County entered an Order on June 29, 1989, granting the relief sought by Petitioner. Respondent filed a Notice of Appeal with the Clerk of the Superior Court of Fulton County on

July 19, 1989. The reporter filed the transcript of proceedings with the Clerk on August 7, 1989, and the case was docketed in the Georgia Supreme Court on January 9, 1990. The Supreme Court received briefs from both parties and heard oral argument on March 13, 1990.

On May 17, 1990, the Supreme Court of Georgia issued a unanimous opinion reversing the judgment of the Superior Court of Fulton County. Petitioner's Motion for Reconsideration was denied May 31, 1990, and the court, on June 1, 1990, granted Petitioner's Motion for Stay of Remittitur for a 90-day period in order for Petitioner to file the instant Petition.

REASONS FOR DENIAL OF THE WRIT

A. THE PETITION DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS.

Petitioner seeks to appeal from the judgment of the Supreme Court of Georgia that O.C.G.A. § 40-13-33, a state statute of limitation on the filing of habeas corpus petitions challenging misdemeanor traffic convictions, is not an unconstitutional suspension of the writ. As is set forth in greater detail *infra*, Respondent submits that the determination as to whether habeas corpus proceedings or other post-conviction relief will be afforded is a matter left for the states to decide which does not implicate the United States Constitution. Even if the Constitution is implicated, Respondent submits that the Georgia Supreme Court correctly analyzed this issue and correctly concluded that the statute in question is not an unconstitutional suspension of the writ. Respondent contends

that there are no substantial federal questions presented for review, as the State is simply not required to provide avenues for post-conviction relief in the State's own courts. *Cf. Ross v. Moffitt*, 417 U.S. 600, 611 (1974) (*citing McKane v. Durston*, 153 U.S. 684, 687 (1894)). *See also Griffin v. Illinois*, 351 U.S. 12 (1956).

B. A TIME LIMITATION ON FILING A PETITION FOR WRIT OF HABEAS CORPUS TO REVIEW MISDEMEANOR TRAFFIC CONVICTIONS IS NOT AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT.

It is undisputed by the parties to this action that Petitioner did not file his Petition for Writ of Habeas Corpus within the time prescribed in O.C.G.A. § 40-13-33. As relevant to the case at bar, that Code section provides that:

> (a) Any challenge to a misdemeanor conviction of any of the traffic laws of this State, or the traffic laws of any county or municipal government which may be brought [by petition for writ of habeas corpus] must be filed within 180 days of the date the conviction becomes final.
>
> (b) Any challenge to a conviction specified in subsection (a) of this Code section which became final before March 28, 1986, must be filed within 180 days following March 28, 1986.
>
> • • •
>
> (d) Failure to file a challenge within the time prescribed in this Code section shall divest the court of jurisdiction.

O.C.G.A. § 40-13-33. Petitioner failed to file his Petition for Writ of Habeas Corpus in a timely manner as required

by Georgia law. Accordingly, the Supreme Court of Georgia found that the trial court erred in failing to dismiss the petition. Petitioner contends that this statute violates the provisions of Art. I, Sec. IX, Cl. II of the United States Constitution, as the time restriction on the filing of habeas corpus petitions is a prohibited suspension of the writ of habeas corpus. The Georgia Supreme Court rejected that contention in the case at bar, following its previous ruling in *Earp v. Boylan*, 260 Ga. 112 (1990).

Respondent contends that Petitioner's claim is without merit. Although the United States Constitution prohibits the federal government from suspending the writ of habeas corpus, except in cases of rebellion or invasion, it has no application to the question of whether the State of Georgia must provide for habeas corpus as a part of its own post-conviction remedies. A person deprived of his liberty by the state is in no way harmed by the state's decision not to provide post-conviction remedies under state law; if he has a meritorious claim, he may simply bring the claim to the federal courts for review. It is therefore clear that Petitioner's arguments are without merit.

Nevertheless, the Georgia Supreme Court proceeded to analyze Petitioner's claims under the assumption that this provision of the Constitution might in some manner proscribe limitations upon habeas corpus relief afforded in the courts of the State of Georgia (Petitioner also contended that the challenged statute violated the similar provision of the Georgia Constitution, an issue of state law not raised here). The court noted that the federal courts presented with the question have held that federal

law does not give the federal courts jurisdiction to entertain a petition for writ of habeas corpus when the only basis alleged to satisfy the statutory requirement that the petitioner be "in custody" is the suspension of a driver's license. *Boylan*, at 113, *citing Harts v. State of Indiana*, 732 F.2d 95 (7th Cir. 1984); *Westberry v. Keith*, 434 F.2d 623 (5th Cir. 1971); *Whorley v. Brilhart*, 359 F. Supp. 539 (E.D. Va. 1973). Other courts which have considered the issue have reached the same conclusion. *Lefkowitz v. Fair*, 816 F.2d 17 (1st Cir. 1987); *Lillios v. New Hampshire*, 788 F.2d 60 (1st Cir. 1986); *Tinder v. Paula*, 725 F.2d 801 (1st Cir. 1984); *Ginsberg v. Abrams*, 702 F.2d 48 (2nd Cir. 1983); *Harvey v. South Dakota*, 526 F.2d 840 (8th Cir. 1975), *cert. denied*, 426 U.S. 911 (1976). Habeas corpus "has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). Petitioner simply was not "in custody" within the meaning of the federal statute at any time during the pendency of this petition. As such, he could not have maintained a petition for writ of habeas corpus in the federal courts, and it is therefore absurd to contend that the Constitution mandates that the State provide for habeas corpus review of his convictions where federal law does not.

The cases cited by Petitioner are not inconsistent with this conclusion. Petitioner relies heavily upon the restrictions upon the use of a motor vehicle present in *Jones v. Cunningham*, 371 U.S. 236 (1963), a case in which this Court found that the petitioner was in custody even though not incarcerated. However, careful review of that case discloses that the restrictions upon the petitioner's

use of a motor vehicle were not imposed as independent, administrative consequences of a traffic violation; the petitioner was serving the remainder of an *unexpired* sentence on parole and the restrictions on his use of a motor vehicle were some of the numerous conditions of that parole. The Court found that the sum of these conditions, rather than merely the restrictions upon the use of a motor vehicle, sufficiently restrained the petitioner's liberty to lead to the conclusion that an individual serving an unexpired sentence on parole remained "in custody" for the purpose of habeas corpus review. *Jones* does not stand for the proposition that the mere suspension or revocation of a driver's license, standing alone, renders the individual "in custody" for the purposes of habeas corpus review.

Similarly, *Maleng v. Cook*, 490 U.S. ___, 104 L.Ed.2d 540, 109 S.Ct. 1923 (1989) also supports Respondent's position. There, the prisoner had completed service of a state sentence, was serving a federal sentence, and would embark upon the service of another state sentence after the completion of the federal sentence. He alleged that the initial state sentence would increase the required term of service of the second state sentence, and therefore sought review by writ of habeas corpus. The Court held that, once a sentence has fully expired, a petitioner is no longer "in custody" because of the possibility that the prior conviction may enhance subsequent sentences. *Id.*, at 545-46. The Court noted that the petitioner could challenge the initial conviction in his challenge to incarceration on the subsequent sentence, allowing him to proceed at that time because he was subject to a detainer to ensure his return for service of the state sentence. *Id.*, at 546. A

driver's license revocation is not a detainer, nor in any way comparable, and *Maleng* does not so hold.

Finally, Petitioner makes the argument that "mere delay" in bringing a habeas corpus petition is not a basis for its dismissal. There is no basis in law for this argument. Initially, Petitioner relies upon a Georgia case addressing solely issues of state law in which there was no applicable statutory provision regulating the time of filing of the petition. *Zant v. Cook*, 259 Ga. 299 (1989). Thus, the analysis in *Cook* was based upon the common law doctrine of laches, not upon a statutory period of limitation, and presented no constitutional issues for decision by the court. Similarly, in *Heflin v. United States*, 358 U.S. 415 (1959), Petitioner notes this Court's statement that "there is no statute of limitations, no res judicata, and . . . the doctrine of laches is inapplicable." *Id.*, at 420. This statement is contained in a concurring opinion written by Justice Stewart. Moreover, the statement, taken in context, addresses questions of statutory interpretation, not constitutional mandates. Nothing in *Heflin* stands for the proposition that Congress, in establishing a system of post-conviction review under federal law, or the states, in establishing their own such procedures, could not establish a statute of limitations, the doctrine of res judicata, or the doctrine of laches as applicable to habeas corpus proceedings. Indeed, Petitioner fails to note this Court's statement in *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986), in which the Court noted that:

> Despite many attempts in recent years, Congress has yet to create a statute of limitations for federal habeas corpus actions. . . . We should not lightly create a new judicial rule, in the guise of

> constitutional interpretation, to achieve the same end.

Respondent asserts that the converse is also true; the Court should not create a new judicial rule, in the guise of constitutional interpretation, forbidding that end.

Clearly, there is no constitutional prohibition against the enactment and enforcement of a period of limitation for the filing of petitions seeking post-conviction review, including petitions for a writ of habeas corpus. The statute in question is limited in its application to individuals convicted of misdemeanor traffic violations. The statute imposes absolutely no time limitation upon the filing of a petition for writ of habeas corpus by convicted felons. The State of Arkansas has, however, imposed just such a limitation. As construed by the Supreme Court of Arkansas, the Arkansas Rules of Criminal Procedure provide for post-conviction review, but limit such review to petitions brought within three years of the date of commitment. Ark. R. Crim. P. 37.1, 37.2. The Eighth Circuit Court of Appeals has held that the failure to bring a timely petition under Arkansas law operates to bar subsequent consideration of a prisoner's claims in federal habeas proceedings, based upon the procedural default in failing to timely file the state petition. *Williams v. Lockhart*, 873 F.2d 1129, 1132 (8th Cir. 1989). Other states have imposed statutes of limitation, to varying degrees. Nevada limits the filing of pretrial habeas corpus petitions by prohibiting consideration of petitions filed later than 21 days after the first appearance of the accused before the trial court. *Grego v. Sheriff*, 574 P.2d 275 (Nev. 1978). Even timely filed petitions will not be considered unless the defendant waives the Nevada statutory requirement that

trial commence within 60 days. Both Nevada and Georgia have statutes which limit the time within which an appeal from the trial court's ruling on a habeas petition may be brought. *See Jordan v. Housewright*, 696 P.2d 998, 999 (Nev. 1985); *Patterson v. Earp*, 257 Ga. 729 (1988).

The statute of limitations found in O.C.G.A. § 40-13-33 finds its closest counterpart in federal law in Rule 9(a) of the Rules Governing Section 2254 Cases. Rule 9(a) establishes the defense of laches in federal habeas corpus proceedings. If filing of the petition has been delayed so as to prejudice the respondent's ability to respond to the petition, the petition will be dismissed unless the petitioner can demonstrate that, through the exercise of reasonable diligence, the petition could not have been brought earlier. *See, e.g., Lawrence v. Jones*, 837 F.2d 1572 (11th Cir. 1988). The Georgia statute, of course, has an additional feature not provided by Rule 9(a); the statute provides a clear and definite period of time within which the petition is, as a matter of law, timely. Thus, both the petitioner and the respondent can by simple mathematical calculation determine whether the petition is timely filed, without expending time and resources of the parties and the court on a petition later dismissed as tardily filed, and without expending these resources in a case by case determination of whether the equities favor consideration of the merits of a petition. Of course, the definite time period established by the statute also promotes greater uniformity of result.

All statutes of limitation have as their goal the promotion of justice by preventing erroneous determinations through the presentation of claims that have been

allowed to slumber until evidence has been lost, memories have faded, and witnesses are no longer available. *See Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 348-49 (1944). The basic theory behind all statutes of limitation is that, even where one has a just claim, that claim should be brought in a timely manner in order that the finder of fact may make accurate determinations; over time, the State's interest in accurate determinations comes to outweigh the litigant's right to assert the stale claim.

Just as the equitable defense of laches embodied in Rule 9(a) is not an improper suspension of the writ of habeas corpus, Georgia's statutory period of limitation is also not an improper suspension of the writ. While invalid convictions should be set aside, the State has a compelling interest in not having valid convictions set aside simply because memories have faded and manufactured claims can no longer be refuted due to the passage of time.

Petitioner's statements to the contrary notwithstanding, the State of Georgia in no way prevented Petitioner from filing his petition in a timely manner. Contrary to Petitioner's claim, Georgia does not require a petitioner whose driver's license has been suspended or revoked to "first exhaust available administrative remedies. . . . " Rather, Georgia has established a two-track system of review. Alleged administrative errors by the Department of Public Safety in revoking or suspending the license are subject to an administrative review, from which the driver is afforded the opportunity to seek judicial review. As the purpose of this review is to eliminate administrative errors by the Department, the only ground upon

which a conviction used by the Department as a basis for the suspension or revocation of a license may be challenged is if the conviction is void on its face. *See, e.g., Earp v. Fletcher,* 183 Ga. App. 593, 594 (1987). If the driver agrees that the Department of Public Safety has not made administrative errors, but contends that the *courts* erred in the proceedings leading to his conviction and sentence, he may challenge those convictions by petition for writ of habeas corpus. *Hardison v. Martin,* 254 Ga. 719 (1985). *Earp v. Lynch,* 257 Ga. 633 (1987) is not to the contrary. *Lynch* (and its predecessor, *Earp v. Angel,* 257 Ga. 333 (1987)) does not establish a contrary rule of exhaustion; in those cases, the Supreme Court ruled simply that the driver sought review of alleged administrative errors by the Department of Public Safety which were cognizable only in the administrative review proceedings, not by petition for writ of habeas corpus. Thus, contrary to Petitioner's contentions, there is no "Catch 22" in the Georgia statute. If the driver wishes to challenge administrative errors of the Department of Public Safety, he may seek to rectify those alleged errors through the administrative review procedures; if he claims, as here, that the courts in which he was convicted committed error of constitutional dimension in the proceedings leading to the conviction and sentence, he may seek review of those convictions by petition for writ of habeas corpus.

CONCLUSION

Respondent properly revoked Petitioner's driver's license based upon his three convictions for driving under the influence of alcohol or drugs within a five-year period. Notwithstanding O.C.G.A. § 40-13-33, which requires that a driver seeking review by petition for writ of habeas corpus of misdemeanor traffic convictions file the petition within 180 days of conviction, Petitioner did not file his petition until some two years after the last of his three convictions. The record clearly demonstrates that Petitioner had completed service of the sentences for the convictions challenged in the case at bar prior to the filing of the petition, and thus could not have maintained a petition for writ of habeas corpus in the federal courts at any time during the pendency of this matter. Petitioner contends that the United States Constitution requires the State of Georgia to provide, in state post-conviction proceedings, a remedy where no federal remedy is afforded. This argument is absurd. If the constitutional prohibition against the suspension of the writ does not require the federal courts to entertain Petitioner's Petition for Writ of Habeas Corpus, it clearly does not require the State of Georgia to do so. Moreover, it is urged by Respondent that, while the United States Constitution prohibits the suspension of the writ of habeas corpus in the federal courts, it has no application to whether the state chooses to afford any post-conviction remedies in its own courts, and emphatically does not require the State to entertain stale claims brought by individuals who have sat upon their rights rather than asserting them in a timely manner. Accordingly, Respondent respectfully requests that

this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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